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No. 90-1441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARVIN PINKNEY,

Petitioner,

vs.

JOHN KEANE, Superintendent, Sing Sing Correctional Facility, Ossining, New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN J. SANTUCCI
District Attorney
Queens County
Attorney for Respondent
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 520-5523

MICHAEL O'BRIEN
JOHN CASTELLANO
Assistant District Attorneys
Of Counsel

26 p

QUESTIONS PRESENTED

1. Whether the doctrine of collateral estoppel bars federal courts from consideration of handguns seized from the petitioner's car but found suppressible on state appeal in assessing the proof of guilt for harmless error analysis?

2. Whether comity forecloses federal courts from considering evidence suppressed by a state intermediate appellate court in determining whether that state was unconstitutionally depriving an innocent person of liberty?

3. Whether federal courts in entertaining an application for habeas corpus relief are limited to reviewing only those issues and facts raised by the petitioner?

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STATEMENT OF THE CASE

Upon the affirmance of his conviction of murder by New York State's reviewing courts, the petitioner sought federal habeas corpus relief claiming that his conviction rested on infringements of his federal

constitutional rights. Specifically, he contended that the trial court erred in permitting the arresting detective to testify that as he gave Miranda warnings, the petitioner interrupted him saying "Don't bother - I've got nothing to say"; also, he asserted that the trial court derailed his argument that his identification at a hospital bed was suggestive. The United States District Court found merit in the contentions but where the evidence established "guilt beyond a shadow of a doubt" (App. 43)* deemed them harmless and resulting in no influence on the jury. In reaching this appraisal, the habeas court conducted a hearing, sought legal briefing, and reviewed the entirety of evidence

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* References are to pages in the Petitioner's Appendix; the respondent relies upon the decisions printed therein for a complete statement of facts of the case. See App 4-7; App 26-29; App 52-53; App 54-61

produced at trial. Part of this evidence consisted of two handguns - one of them ballistically established as the fatal weapon - found in the petitioner's car parked on a public street. The New York State intermediate appellate court had determined the same guns inadmissible on review finding them the product of a seizure without probable cause or exigent circumstances. The district court did not consider itself bound by the state holding on federal law in conducting a plenary review of state proceedings. On appeal to the United States Court of Appeals and to this Court, the petitioner contends that collateral estoppel, comity and federalism restrict the focus and scope of a federal habeas corpus court's powers of review in his quest for relief under the Great Writ.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Collateral Estoppel

As a doctrine of criminal jurisprudence, collateral estoppel, embodied in the Fifth Amendment guarantee against double jeopardy, holds that once an issue of ultimate fact has been concluded by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *Breed v. Jones,* 421 US 519 (1987); *Ashe v. Swenson,* 397 US 436 (1970). Integral to this concept is the notion of finality, implying a determination by the highest courts within a jurisdiction upon litigation of the issue to its legal conclusion. Generally, a failure to seek ultimate resolution of the issue by petitioning for further review, as is the case here on the suppression issue determined by an intermediate appellate

court, would give preclusive effect to the issue. However, when the aggrieved party has no incentive for pursuing the matter, the want of appeal in such an instance should not result in finality. See, *Cromwell v. Sac County,* 94 US 351 (1876) (various considerations other than actual merits may govern a party in pursuing legal options, e.g. smallness or lack of value of property at stake; a party acting on these considerations ought not to be precluded from subsequent contest of the issues). A similar rationale was followed in *Staatsburg Water Co. v. Staatsburg Fire District,* 72 NY2d 147 (1988) which recognized that collateral estoppel is an elastic doctrine not to be mechanically applied but to take into "consideration the realities of litigation; such as the recognition that if the first proceeding involved trivial stakes, it may not have

been litigated vigorously" *id.* 153. The *Fire v. Water* case continued that "it would be an unwarranted extension of that principle and fundamentally unfair to give preclusive effect to a determination where the only incentive to litigate stems from its potential collateral effects." *id.* 155. So too, with the case at bar, the fact that petitioner's murder conviction was affirmed left the prosecution with no impetus to appeal the adverse determination on charges of lesser magnitude, which, even if found in the prosecutor's favor on appeal, would have no impact on the underlying validity of the judgment of conviction or term of imprisonment. Because of the absence of incentive to appeal and "the realities of litigation" where justice was already satisfied, the decision on the matter of the guns, should not be binding in the subsequent proceedings.

Secondly, because collateral estoppel protects against relitigating matters for which the accused was acquitted, the risk involved is not present in proceedings that are not essentially criminal. *Breed v. Jones, supra,* 421 US at 528; *see Showery v. Samaniego,* 814 F.2d 200, 203 (5th Cir. 1987) (inability of state to establish petitioner's commission of offense at hearing on a bond, did not collaterally estop prosecution for criminal act). Stated otherwise, "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." *United States v. Wilson,* 420 US 332, 344 (1977). Thus, since the petitioner brought on this essentially civil proceeding, he acted with assurance that the state could in no way cause either a reversal of his conviction or enhancement of his

punishment on the gun counts. *Fay v. Noia,* 372 US 391, 423-4 (1963) (habeas corpus a civil remedy rather than as a stage of the criminal proceeding or an appeal therefrom is thus independent from what has been decided beforehand). Because the petitioner was not placed at risk again for crimes which resulted in dismissals, he cannot assert a deprivation of constitutional rights merely because the district court examined his connection to the guns in an independent review of the facts.

Rather, this situation can be likened to those where dismissals of different counts of an indictment do not necessarily insulate the facts underlying those counts from exploration and further use. *See, e.g., United States v. Rivero,* 532 F.2d 450, 457 (5th Cir. 1976) (evidence of narcotics connected to charge dismissed with prejudice

admissible in prosecution for other crimes); *United States v. Stearns,* 707 F.2d 391, 394 (9th Cir. 1983) (dismissal of theft charge had no collateral estoppel effect on question of whether a theft was committed on defendant's felony murder trial); *United States v. Stricklin,* 591 F.2d 1112 (5th Cir. 1979) *cert. den.* 444 US 963 (facts underlying indictment dismissed on speedy trial grounds admissible). By additional analogy, while the weapons may not be admissible as matters stand in New York on the state's direct case, they would nonetheless be germane for purposes of impeachment, rebuttal or to establish motive, intent or the like. *See, Walder v. United States,* 347 US 62 (1954) (suppressed evidence used to impeach defendant); *Oliphant v. Koehler,* 594 F.2d 547, 555 (6th Cir. 1979) (defendant's prior bad acts resulting in acquittals

introduced to show modus operandi "since the state prosecutor did not seek to relitigate any issue which had previously been determined in [petitioner's] favor, his claim of collateral estoppel is without merit"). Boiled to basics, collateral estoppel does not arise in this petitioner's case warranting a finding that the federal courts below acted in derogation of his Fifth Amendment right against being "subject for the same offense to be twice put in jeopardy of life or limb".

2. Comity

In rejecting a procedural default argument from the prosecutor's determination not to appeal the Appellate Division's modification of the judgment of conviction by reversing the gun counts which resulted in deletion of concurrent sentences lesser than the sentence for murder, the Court of Appeals said:

Here, the federal court's review of the state proceeding neither frustrates the state's power to punish offenders, nor impugns the state's good faith in honoring constitutional rights. Indeed, a federal habeas court's correction of a state appellate court ruling in defendant's favor can only result in the federal court's upholding the state conviction and faulting the state court for overzealousness, not neglect, in the protection of federal constitutional rights. Appellant's strange notion of comity, on the other hand, would have us upset a valid state conviction in order to

> shield an appellate court ruling that overzealously protects federal rights (App. 10).

Succinctly stated, comity is not involved since there has been no attempt to upset a state court conviction by a federal court without first affording the state courts an opportunity to correct a perceived constitutional violation. *Rose v. Lundy,* 455 US 509, 518 (1982). Rather, the courts below effectively upheld the state court's determination and thus can hardly be called to task for interference and disruption of state court proceedings. Although contrary to the express holding of the Appellate Division as to the suppression of the guns, the federal courts effectively adopted a nonetheless legitimate basis for upholding the constitutionality of the conviction. As observed in *Sanders*

*v. United States,*373 US 1, 23 (1963) in a different context, federal habeas courts are not required to limit determinations to the grounds narrowly alleged; instead courts are "free to adopt any appropriate means for inquiry into the legality of the prisoner's conviction in order to ascertain all possible grounds upon which the prisoner might claim to be entitled to relief."

Significantly, where the petitioner and not the state sought federal redress, the principle of exhaustion need not apply. In their respective postures with the petitioner seeking release, the prosecution, affirmance, and the courts the constitutional underpinnings of the state action, the factual and legal questions became subject to de novo review. And while a factual finding of a state court may be entitled to deference, no such treatment is to be accorded a

state court's legal conclusion as to the federal law. "It is the district judge's duty to apply the applicable federal law to the state court's fact finding independently." *Miller v. Fenton,* 474 US 104, 110, 112 (1985); *Townsend v. Sain,* 372 US 290, 318 (1963). Here, the courts fully complied with their statutory and decisional mandates without running afoul of comity by applying federal law to a state matter without upsetting the state's ultimate determination.

3. **The Scope of Habeas Review**

A federally issued writ of habeas corpus reaches only convictions obtained in violation of the United States constitution, and absent such a violation, a federal court would err in ordering a new trial. *Smith v. Phillips,* 455 US 209, 221 (1982). Here, the key issue for determination was the sufficiency of evidence of guilt wherein

even errors of constitutional magnitude would be forgiven if there was no question of the petitioner's guilt. *Rose v. Clark,* 478 US 570 (1986); *Chambers v. Maroney,* 399 US 42 (1970); *Chapman v. California,* 366 US 18 (1967). The state reviewing court found that the trial court erred in ruling that the guns were inadmissible on search and seizure grounds and set aside the petitioner's convictions on the weapons count but nonetheless deemed their introduction into evidence at trial harmless. The district court agreed with the factual but not with the legal conclusion finding that there was no basis under federal law for suppressing the guns on Fourth Amendment grounds. (See A 9-16; see also Point Two, supra).

In making this determination, the reviewing court was fulfilling its mandate to search the record to determine

the basis for the petitioner's claim. Recognizing that a state court's finding on suppression issues are to be given great weight on such review, a federal court still has a duty to make an independent determination that due process has been observed at the state proceeding. *Fay v. Noia, supra; United States ex rel. Preston v. Mancusi,* 422 F.2d 940, 943 (2d Cir. 1970). Although a district court judge may defer to a state court's finding of fact, "he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court's fact findings independently". *Miller v. Fenton,* 474 US 104, 110, 112 (1985); *Wainwright v. Sykes,* 433 US 72 (1977); *Townsend v. Sain,* 372 US 293, 318 (1963) (federal district courts to conduct plenary review of constitutional issues).

Here the appellant would have the federal courts blind themselves to the trial record and law in order to reach an unjustifiable result as if the courts were acting in a vacuum and in disregard of the overwhelming proof of his guilt. Seeking equitable relief by way of habeas corpus, a petitioner must come before the court with clean hands or a "colorable showing of factual innocence" so that the court may do what the ends of justice require. *Kuhlman v. Wilson,* 477 US 436, 454 (1986).

In *Stone v. Powell,* 428 US 465, 469 (1976) limits were set on the remedy of habeas corpus review for those who claimed that their convictions and confinement resulted from the use at trial of evidence unlawfully seized. That court noted "[a]pplication of the rule thus deflects the truthfinding process and often frees the guilty. The

disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty petitioner by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." Faced with an anomalous decision of the Appellate Division wherein certain issues were passed over as harmless errors and yet a conclusion was reached in a barebones fashion that "[u]nder the facts of this case, the search was neither supported by probable cause nor justified by the exigent circumstances or any other exception to the exclusionary rule" (App. 51), the district court in the exercise of authority under 28 USCA §2254 had a duty to decide the constitutional question when necessary to dispose the litigation before it. *County Court of Ulster County v. Allen,* 442 US 140, 164 (1979). Thus, the court rightfully

concluded, for purposes of habeas corpus review, that the guns were not beyond its purview and that they were includable in its calculus of harmless error, as well as its assuring itself that an innocent person was not wrongfully convicted. *Rose v. Clark, supra,* 478 US at 576 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

John J. Santucci
District Attorney
Queens County
Michael O'Brien
Assistant District Attorney
John Castellano
Assistant District Attorney
Attorneys for Respondents